

Chief Judge Ricardo S. Martinez

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

HUAWEI DEVICE CO., LTD., and  
HUAWEI DEVICE USA, INC.,

Defendants.

NO. CR19-0010RSM

**GOVERNMENT'S MOTION  
REGARDING THE  
DISCOVERABILITY OF A  
PARTICULAR DOCUMENT**

**(Noted for May 10, 2019)**

The United States of America, by and through, Annette L. Hayes, First Assistant United States Attorney for the Western District of Washington (Acting Under Authority Conferred by 28 U.S.C. § 515), and Todd Greenberg, Thomas Woods, and Siddharth Velamoor, Assistant United States Attorneys for said District, hereby moves the Court for an order clarifying that a particular document is not discoverable under the government's discovery obligations.

**INTRODUCTION**

As part of the pre-trial discovery process, the Huawei defendants have requested that the government produce all correspondence between the government and T-Mobile, the victim in this case. The government has produced all such correspondence except one memorandum from the government to T-Mobile, which analyzed factual and legal

1 issues regarding the potential for the Court to award restitution to T-Mobile as part of the  
2 sentence in this case. This memorandum is not discoverable because it contains no facts  
3 that otherwise were not disclosed in discovery, and simply contains government  
4 counsel's legal analysis as to the potential availability of restitution.

5 After Huawei made its discovery request, the government informed counsel for  
6 Huawei by letter that it planned "seek[] clarification from the Court *ex parte* as to  
7 whether a particular document is discoverable, consistent with Ninth Circuit practice."  
8 The government then moved *ex parte*, requesting that the Court clarify that the  
9 government's memorandum was not discoverable.

10 The Court entered an Order denying the government's motion without prejudice.  
11 The Order indicated that the government could re-file the motion in a manner that would  
12 provide Huawei with greater notice and an opportunity to respond. The Order also stated  
13 that the government could provide supplemental justification for its position *ex parte*. In  
14 light of the Court's Order, the government is hereby filing this motion along with an *ex*  
15 *parte* submission that discusses in more detail the contents of the memorandum, which  
16 provides further justification as to why the memorandum is not discoverable.

### 17 **BACKGROUND**

18 In this case, the government alleges that Huawei Device Co., Ltd., and Huawei  
19 Device USA, Inc. (collectively "Huawei") engaged in a long-running scheme to steal  
20 trade secrets from T-Mobile, and then obstructed justice by covering up the full scope of  
21 the scheme, after one of Huawei's employees was caught stealing a robotics part from T-  
22 Mobile's laboratory. Prior to the indictment being obtained, T-Mobile had sued Huawei  
23 Device USA, Inc., and another Huawei entity, alleging a variety of state-law claims  
24 stemming from the same theft scheme that forms the basis of the criminal case. *See T-*  
25 *Mobile USA Inc. v. Huawei Device USA Inc.*, CV14-1351RAJ.

26 In light of T-Mobile's status as the victim of the crimes charged in the Indictment,  
27 during its investigation the government conferred with T-Mobile about a variety of  
28 issues, including the potential for restitution. *See Crime Victims' Rights Act*, 18 U.S.C. §

3771.<sup>1</sup> As part of this process, T-Mobile provided the government with a memorandum outlining its position regarding restitution.<sup>2</sup> The government then wrote a responsive memorandum to T-Mobile, reviewing the applicable case law governing restitution, analyzing the facts in the civil trial record under this case law, and setting forth legal conclusions under this analysis. The government’s memorandum did not discuss any facts outside of the civil trial record.

## **ARGUMENT**

### **I. THE COURT CAN REVIEW *EX PARTE* and *IN CAMERA* TO CLARIFY WHETHER A PARTICULAR DOCUMENT IS DISCOVERABLE.**

It is well established that a district court has the authority to review documents *ex parte* and *in camera* to clarify whether a particular document is discoverable. As the Ninth Circuit has stated, “If the prosecution is uncertain about the materiality of information within its possession, it may submit the information to the trial court for an *in camera* inspection and evaluation.” *United States v. Cadet*, 727 F.2d 1453, 1467–68 (9th Cir. 1984); *see also Milke v. Ryan*, 711 F.3d 998, 1016 (9th Cir. 2013); *United States v. Calise*, 996 F.2d 1019, 1021 (9th Cir. 1993); *United States v. Jones*, 612 F.2d 453, 456 (9th Cir. 1979) (“*In camera* inspection and excision are procedurally sound methods for rendering appropriate material available to the defense.”).

As noted above, the government does not believe that its memorandum is discoverable. The government, however, takes its discovery obligations extremely seriously. Thus, in an abundance of caution, the government is submitting the memorandum to the district court for clarification as to whether it must be disclosed to the defense.

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<sup>1</sup> Under the Crime Victims’ Rights Act, victims have the right to confer with the prosecutors, and to “full and timely restitution as provided in law.” *Id.* § 3771(a)(5), (7).

<sup>2</sup> The government has produced this memorandum because Huawei could theoretically attempt to impeach T-Mobile witnesses on the ground that T-Mobile has an economic stake in the outcome of the case.

1       **II. THE GOVERNMENT’S MEMORANDUM IS NOT DISCOVERABLE.**

2       The government respectfully submits that its memorandum is not discoverable.  
 3       The memorandum sets forth government counsel’s legal analysis of the applicable law as  
 4       applied to the facts in the civil trial record. Because the government has already  
 5       produced in discovery all of the underlying factual materials analyzed by the  
 6       memorandum, it is not required under *Brady* or Rule 16 to also produce its legal analysis  
 7       of those factual materials. *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006) (“The  
 8       animating purpose of *Brady* is to preserve the fairness of criminal trials. However,  
 9       fairness does not encompass an obligation on the prosecutor’s part to reveal his or her  
 10      strategies, legal theories, or impressions of the evidence.” (internal citation omitted));  
 11      *United States v. Furrow*, 100 F. Supp. 2d 1170, 1178 (C.D. Cal. 2000) (“*Brady* may  
 12      entitle defendant to production of the mental health and psychiatric records [*i.e.* the  
 13      exculpatory evidence at issue in the case] . . . , however, *Brady* does not reach the  
 14      prosecution’s analysis of them.”); *United States v. Pac. Gas & Elec. Co.*, 2016 WL  
 15      3185008, at \*8 (N.D. Cal. June 8, 2016) (district court would review prosecutor’s legal  
 16      memoranda and order disclosure only if they contain “underlying exculpatory facts” that  
 17      must be disclosed under *Brady*,” noting distinction between exculpatory evidence and  
 18      analysis of such).

19      The memorandum is also not a Jencks Act statement of any witness. Nor is it  
 20      impeachment material because the memorandum does not discuss any witnesses who are  
 21      expected to testify in the case. In sum, the memorandum is not discoverable.

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23      //

**CONCLUSION**

For all of the reasons set forth above, the government moves the Court to enter an order clarifying that the government's memorandum is not discoverable under the government's discovery obligations.

DATED this 26th day of April, 2019.

Respectfully submitted,

ANNETTE L. HAYES  
First Assistant United States Attorney  
(Acting Under Authority Conferred by  
28 U.S.C. § 515)

s/ Todd Greenberg  
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 26, 2019 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s).

*s/Jenny Fingles*

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